TWO CONCEPTIONS OF THE FREEDOM OF THE SEAS[1]

ADMIRALTY lawyers and students of the *Digest* of Justinian will remember that the law of jettison is derived from the law of Rhodes. The *Digest* states: "It is provided by the Rhodian Law that if merchandise is thrown overboard to lighten the ship, the loss occasioned for the benefit of all must be made good by the contribution of all." This reasonable rule of average has prevailed through the centuries, and its reception into the Roman law as set forth in the *Digest* gives point to the pleasant, though perhaps apocryphal, story which follows in the same title:

> A petition of Eudaimon of Nicomedia to the Emperor Antoninus. Lord Emperor Antoninus: Being shipwrecked in Icaria, we have been plundered by the tax-farmers who live in the Cyclades Islands. Antoninus said to Eudaimon: I am indeed lord of the world, but the Law is lord of the sea.[2]

Vastly different in spirit is the statement of the *Institutes*: "The following things are by the Law of Nature common to all: the air, running water, the sea, and consequently the seashore."[3] The one sets forth the hard practical rule which had developed during years, perhaps centuries, of active maritime commerce in the Eastern Mediterranean, adopted by Rhodian merchants and seamen, not because of any philosophical predilections, but because it was one of the customs of the sea. The other is a doctrine drawn from the law of nature, that body of immutable universal law discoverable by man in the exercise of right reason for which the term "principles of justice" might be substituted, or from that law which nature has taught all animals, a law which, as Ulpian conceived, is shared by all living creatures. These two conceptions, the one derived from the custom of the sea, the other from the philosophic law of nature, have furnished the basis of the historical arguments for the freedom of the seas, while to the proponents of sea sovereignty they have been stumbling-blocks, such was the transcendent authority of the Roman law, impossible to ignore and difficult to combat.

It is not easy for us to understand why the Romans, who so effectively maintained sea power over the Mediterranean and who

[1] A paper read at the meeting of the American Historical Association in Cincinnati, December 27, 1916.

[2] *Digest*, XIV. ii. 1, 9 (Monro's translation); *cf.* Oppenheim, *International Law* (second ed.), I. 315.

[3] *Institutes*, II. 1; *cf. Digest*, I. viii. 2.

recognized that supremacy at sea was vital to the maintenance of land power, did not extend their sovereignty over the sea as well as over the land. It remained to the jurists of the more modern territorial state to develop the doctrine of sovereignty, which was something different from *proprietas,* or *dominium,* or *imperium,* or even of *majestas.* That ownership over portions of the sea was successfully asserted long before the time of Bodin is proved by numerous examples: by Venice, "when the Doges used to wed the sea with rings", by Genoa, by Spain and Portugal, by England and Scotland; and these claims were defended by distinguished civilians:

> "Justinian speak,
> Nor modern Baldo, Bartolo be dumb!"

Modern international law begins with Grotius, and it is of no little significance that the first productions of this marvellous intellect, upon topics in that science of which he is acclaimed the father, were litigious legal briefs challenging the claims of the Portuguese, and incidentally of Spain, to exclusive jurisdiction and ownership over the high seas. The *Mare Liberum,* which was published anonymously in 1608, was the work of Grotius. Written in opposition to the Portuguese, its title was a challenge to those nearer neighbors who had so successfully disputed the claim of Spain to ownership of the sea in 1588. The *Mare Clausum* was the answer to the *Mare Liberum.* Grotius and Selden came to be installed as the apostles, the one of the freedom of the seas, the other of the extravagant and arrogant claims of sea power. Both proceeded according to the scholarly, or rather pedantic, fashion of the seventeenth century. Grotius quoted the poets, Vergil, Ovid, and Horace, with Tacitus, Pliny, and Seneca, but above all the *Institutes* and the *Digest.* Selden used the Scriptures, Old and New, the Talmud, the Fathers, and ranged together more classical quotations, Greek as well as Latin, than did his predecessor. He showed that, as at various times since the Flood portions of the sea had naturally been subjected to territorial ownership and dominion, therefore such dominion existed by the "permissive" law of nature, a truly pragmatic extension of that conception of the law of nature with which the *Institutes* open and upon which legal philosophy rested from Cicero through Aquinas to Grotius, Pufendorf, and Burlamaqui. England, he claimed, had exercised authority over the waters about the British Isles and therefore it had the right to do so. Doubtless Selden claimed too much for England's prescriptive right; his immediate purpose was to furnish an argument for keeping the Dutch

and others out of the British herring fisheries, a matter in which the Scots had long been interested. Queen Elizabeth had told the Spanish ambassador in 1580 that Englishmen would continue to navigate "that vast ocean", since "the use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, forasmuch as neither nature nor regard of the public use permitteth any possession thereof". In 1588 considerable weight was added to this contention. Selden represented the Stuart point of view. Elizabeth had denied that sovereignty could be exercised over the Great Ocean; the Stuarts claimed ownership over the adjacent seas.

Grotius, on the other hand, stood squarely on the law of nature. The pregnant sentence of the *Institutes* that "the air, running water, the sea . . . are common to all" is the text of his *Mare Liberum.* As is frequently to be noted in his *Law of War and Peace,* Grotius attributed to states the rights and duties which the law of nature imposed upon individuals. States were to each other as individuals in a state of nature. What is related to individuals through ownership is imputed to states as sovereignty. As the individual acquires title to property, so the state gains title to territory. And here is the error of Grotius: territorial sovereignty was something in essence different from ownership. It was in relation to private ownership that the *Institutes* set forth the freedom of the seas, not that the seas were owned by no one, nor that they were public, or, as we should say, national property; but that they were common to all men. Translating private ownership into terms of territorial sovereignty, Grotius denied that a state could exercise sovereignty over the ocean and predicated the right of all states to use it. Proceeding in another direction, Selden fell into an error of a different kind. With him jurisdiction passed beyond sovereignty into complete ownership, at least over the marginal seas, with all the incidents associated with the conception of property, and without limit as to their immediate extent. At bottom there is no such fundamental conflict between Grotius and Selden as is commonly supposed. Grotius claimed that the Great Ocean was free by the law of nature, and that the liberty to trade thereon was (or should be) free to all men by the law of nations: "From the perpetual Law of Nature and of Nations is derived that liberty which is to endure forever."[4] Against it ran neither custom nor prescription. Selden is concerned only with the nearer seas, though he does not limit their extent. Jurisdiction over them had been asserted by Baldus and

[4] Grotius, *The Freedom of the Seas* (Carnegie Endowment ed.), p. 66.

other glossators and civilians. "So, while", Grotius says, Baldus and others "are talking about the Mediterranean, we are talking about the Ocean; they speak of a gulf, we of the boundless sea."[5] Selden, in his conclusions, if not in his arguments, follows Baldus. He was claiming for England jurisdiction over the narrow seas and not, as the Portuguese and Spanish did, sovereignty over the boundless ocean.

The defeat of the Armada made in a large sense for the freedom of the seas, but it was license rather than that regulated freedom which Grotius associated with the reign of law, as the exploits of Hawkins, Drake, and their successors abundantly bear witness. It was the merit of Grotius that he furnished the philosophical and juristic basis for the regulated freedom of the seas based upon the fundamental idea that the seas, being common to all, were a universal highway of commerce. The legal idea had long been expressed in other ways. To name the successive medieval sea codes—the Rhodian Sea Law, the Tables of Amalfi, the Consolato del Mare of Barcelona, the Rôles of Oléron, the Little Red Book of Bristol, the Laws of Wisby—is to trace the extension of maritime commerce from the Levant to the Scandinavian peninsula. The law of commerce and the law of the sea are interwoven in their development. Their growth was spontaneous, their spirit was extra-national, they embodied a true common law of nations, a *jus gentium*. An opening sentence of the Consolato reflects the nature of all the codes: "Here begin the good customs of the sea". Universal as the principles of the sea codes were, they lacked the authority of a great juristic system. All of Continental Europe derived its law from Rome; so did Scotland; and, when Grotius wrote, England had but recently saved her common law from the Roman inundation. To what had been toilfully accomplished by the maritime adventurers, from Rhodes to the Hanse Towns, strength and permanency were added by the authority of Roman legal doctrines and by the logic of the law-of-nature philosophy.

The rise of permanent navies proceeds with the extension of modern commerce. Commerce became secure in time of peace, and navies, by policing the seas, drove out the lawless rovers. It is late in the history of English law that the term "pirate" is associated with lawlessness, and it is no mere coincidence that the famous charge of Sir Leoline Jenkins, in which is contained the modern conception of piracy, was set forth at a time (1668) when the admiralty jurisdiction had been vindicated, and England had led the

[5] Grotius, *The Freedom of the Seas*, p. 58.

way in the establishment of modern navies. These, in armament and in strategic use, remained practically unchanged until Navarino (1827). The doctrine of Grotius, that the sea was free, gained headway in spite of England's power to force the striking of flags within the narrow seas. His other doctrine, that by the law of nations everyone should be free to trade upon the sea, was impaired by the national policies of mercantilism. The commercial treaties of the seventeenth and eighteenth centuries proceeded upon a quite different theory from that of Grotius. This was that the right to navigate the coasts and to frequent the ports of the state was a franchise to be exchanged for a valuable consideration. In these treaties, moreover, rights upon the sea in time of war were strictly regulated: the doctrines of contraband, of visitation and search, of asylum for prizes, of reprisals, and indeed of much of the law of maritime neutrality, may be traced therein.

With the peace of Utrecht there were three bases for the regulation of the seas: the doctrines of Grotius, drawn from the law of nature, the customs of the sea developed from medieval codes, and the commercial treaties. The vast ocean was generally recognized as incapable of occupation and free from claims to exclusive sovereignty. Much of the old sea law had been received and enforced by the admiralty courts of many states, while a network of commercial treaties set forth the status of non-belligerents and their property in time of maritime war. One element remained to be determined: the extent to which a state might exercise jurisdiction over the waters bathing its coasts. Many had wrestled with this problem. Bartolus and Gentilis claimed that such jurisdiction extended one hundred miles, or two days' journey, from the seashore. Baldus and Bodin more conservatively limited it to sixty. Perhaps more practical was the maritime custom of regarding all waters visible from the shore as within the power of the littoral state. It was the service of the fellow-countryman of Grotius, Bynkershoek, to supply a rule which is still the fundamental principle governing the marginal seas. This is that the coastal waters are subject to the sovereign jurisdiction of the state because they are appurtenant to the state's land-territory, and that the extension of such jurisdiction is determined by the power which the state is able to exert over such waters from the shore. This sovereign jurisdiction over navigable waters was subject to the right of innocent passage. The general adoption of this doctrine is evidence of the need for a compromise between the extremes of sovereignty and complete freedom of the seas.

With the rivalries of the eighteenth century there developed spe-

cific antagonism to British commerce and British sea power. The doctrine that "free ships make free goods" was pleasant to the small states with weak navies which hoped to remain neutral in time of war. As such it was welcomed by the Scandinavian countries, Holland, and Prussia. If by the law of nature the sea was free, and by the law of nations the right to trade was free to all men, it was an easy step from the doctrine that "free ships make free goods" to that of the complete inviolability of private property at sea during war. Contraband remained an exception; but the list of contraband was limited to the actual implements of war. Such a doctrine harmonized with the spirit of eighteenth-century enlightenment. The treaty between the United States and Prussia, which Adams and Franklin wrote and Frederick II. agreed to, represents the extreme of the law of nature and it was at the same time an affront to existing British sea power. Opposed to England, the United States at the beginning of its history naturally adopted those liberal principles of international maritime law which Grotius had set forth as counsels of perfection and which the Continental countries had adopted as a check upon Great Britain. The armed neutralities of 1780 and 1800 were the last concerted efforts of eighteenth-century enlightenment to conform sea power to the principles of Grotius. A few years later, when France was vainly attempting to break England's naval power, it remained to Barère to become the champion of the freedom of the seas, in a memoir which he ascribed to Napoleon. At the very time, however, when Barère was assailing England as the destroyer of the freedom of the seas, the British prize court, sitting as a court of the law of nations, under Lord Stowell, was deciding cases in which many valuable neutral rights were recognized as against her own sea power. Similarly when the United States was a belligerent, the decisions of Marshall and Story gave a legal superstructure to the modern doctrine of neutrality of which Washington had laid the foundations.

In two respects the freedom of the seas was far from being realized at the close of the Napoleonic era. Piracy such as Jenkins condemned had, thanks to the policing of the seas, practically ceased near the main avenues of sea traffic. The slave-trade, held not to be piracy by the law of nations, was nevertheless put under the ban of the powers of Europe. To the efforts made by the civilized world to suppress this traffic the United States opposed the principles of maritime freedom for which she had entered the War of 1812. What Grotius had set forth as a principle of freedom was used as a cloak for the protection of slavery in the interest of a peculiar policy of the United States. Privateering, again, with the

distribution of prize money was but a form of legalized piracy. Wholly contrary to the spirit of Grotius, every belligerent had engaged in it, and no state to greater advantage than the United States in her first two wars.

The end of the Napoleonic Wars and our second war with Great Britain is the end of an epoch. The doctrine of the law of nature was forever discredited. The introduction of steam, the increase in the size of merchant vessels, the development of regular and frequent means of oceanic transportation changed the character of maritime commerce and of international traffic as well as of naval ordnance, equipment, and strategy. Between the Napoleonic Wars and the Crimean War England's sea power remained supreme while her commercial policy changed. Having adopted free trade, England in 1854 repealed the last of her navigation acts. At the same time, as an ally of France, she adopted the doctrine that "free ships make free goods" and thereby surrendered a large part of the power which her navy gave her. Privateering, which had been rendered obsolete by changes in naval construction, was abolished by the Declaration of Paris. With adhesion to that declaration by all maritime powers, excepting the United States and Spain, it was assumed that in war neutrals might enjoy the freedom of the seas. No state claimed sovereignty over territorial waters much beyond the three-mile strip, a limitation which the United States was the first to adopt. Nothing seemed to remain in the way of the realization of entire freedom of the seas in war and in peace except the complete immunity from capture of private property at sea during war. This the United States had advocated in 1785 and again in 1856, when she declined to adhere to the Declaration of Paris because it did not go far enough. What the law of nature had failed to accomplish the great law-making treaty known as the Declaration of Paris was held to have secured.

International legislation was the means adopted to secure the ultimate freedom of the seas. At the second Hague Conference the United States again, and unsuccessfully, urged the complete immunity of private property at sea during war. Of the ten principal maritime powers there represented, Austro-Hungary, Germany, Italy, and the Netherlands sided with the United States at least in principle; opposed to immunity were Great Britain, France, Russia, Spain, and Japan. The line of cleavage is significant in the light of the present war. The defeat of this traditional contention of the United States was viewed by many of our naval officers with unconcealed delight. In 1856 we had a large merchant marine and no navy; in 1907 we had a large navy and a small merchant marine.

The adoption by the same Hague Conference of a resolution to establish an international prize court showed the need of an international code for maritime warfare. The Declaration of Paris was apparently a successful precedent, though it had never been subjected to the test of a great maritime war. In the effort toward codification England led the way and issued invitations for the naval conference which was held in London in 1908–1909. Reading the instructions to the British delegates and viewing the attitude of Great Britain toward the various proposals of the conference, it is inconceivable that Great Britain then designed any offensive use of her sea power. Dominated either by that newer law of nature called pacifism, or by the belief that in the next great war she would be a neutral, she assisted in the formulation of a code which deprived herself of the effective use of sea power to an extent which to-day seems amazing. By a constitutional obstruction which proved more than fortunate, she entered the great war without having ratified the Declaration of London and without being handicapped by its provisions. The declaration is now an historical document; so is the Declaration of Paris—so are most of the so-called law-making treaties concerning war to which so much thought was given and upon which so much reliance was placed.

The present war has reproduced upon a vaster scale the situation of the Napoleonic era. Reprisal has followed reprisal. The neutral, in a way the trustee and guardian of international law during war, has accomplished nothing. He is of those

> Che visser senza infamia e senza lodo.
> Mischiate sono a quel cattivo coro
> Degli angeli che non furon ribelli
> Né fûr fedeli a Dio, ma per sé foro.[6]

The fancied freedom of the seas has vanished. Strategic areas comprising vaster extent than those for which Selden argued, the mining of the high seas, and the use of the submarine as a ruthless destroyer of commerce, an instrument of *Schrecklichkeit,* have produced an anarchy for which there is no parallel. What can be rescued out of this chaos it is hopeless to conjecture. Where lives have not been taken, arbitration furnishes a remedy for the vindication of law. As Stowell, during the Napoleonic Wars, and Marshall, during our War of 1812, upheld the law of the sea, so the British court, the Judicial Committee of the Privy Council, in the case of the *Zamora*[7] took a position which vindicates that freedom,

[6] *Inf.*, III. 36–39.

[7] April 7, 1916.

for it stated in effect that an Order in Council in opposition to the principles of international law is of no legal validity. A régime of law means an acceptance of a *status quo*. How shall this be reached? Probably not by any balance of power which, on land, has managed over long periods to keep the peace, for a balance of power upon the sea is not conditioned by any analogy to the territorial boundaries of states, the basis of a territorial *status quo*. The sea power of a state is limited only by its desires, its resources, and time. Treitschke voiced the claims of the freedom of the seas as against sea power much as did Barère a century before.

> "Auf den Wellen ist alles Welle,
> Auf dem Meer ist kein Eigenthum."
>
> The melancholy saying of Schiller still [he says] holds good. . . . Deeply mortifying as this is to our [German] pride, it is true, because even today [he was writing in 1892, when Germany's navy was in its infancy] there is no balance of power at sea, and for this we have no one to blame but England. Her superiority is so immeasurable that she can do whatever she pleases. A balance of naval power must be brought to pass before the ideals of humanity and international law can hope to be realized upon the seas.[8]

For twenty years this doctrine was preached and acted upon. The "freedom of the seas" has meant the challenge to British sea power, the quest for a "place in the sun", the development of a large navy to contest the balance of naval power. This is not the freedom of the seas for which Grotius strove, or for which the Armed Neutrality contested, or which the Declaration of Paris proclaimed. The freedom of the seas means the realization of the rescript of the Antonine: "the Law rules the sea", and not the development of an aggressive foreign policy. That England has at times used her sea power arrogantly no American is apt to deny. At the same time, to the securing of what freedom the seas possessed in the century between 1814 and 1914, while her sea power was undisputed, England made the principal contribution. The oceans have been policed, the slave-trade destroyed, non-belligerent visitation and search repudiated, impressment of alien seamen surrendered, trade and navigation made free. Notwithstanding Britain's power, the international commerce and carrying trade of other nations increased to the point of successful rivalry. What would strike at these things is miscalled the freedom of the seas. The infamous misdeeds of the submarine have made less for the freedom of the seas than did the guillotine for liberty. The guillotine at least gave warning before it struck, and its purveyors spared innocent and helpless children.

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[8] Treitschke, *Politics* (Eng. trans., 1916), II. 617–618.